

Fair Political Practices Commission
MEMORANDUM

To: Chairman Getman, Commissioners Downey, Knox and Swanson

From: Luisa Menchaca, General Counsel
Carla Wardlow, Chief, Technical Assistance Division

Date: September 23, 2002

Subject: Project Proposals – Conflict of Interest Codes and Statements of
Economic Interests

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To implement the Commission's goals and objectives for the year 2002, in April 2002, staff identified concrete projects in the conflicts/disclosure area for Commission consideration. The Commission selected five proposals for consideration in 2002. The status of each project is discussed in a separate memorandum. It is anticipated that action on one or more of these items will continue through December 2002. The projects are summarized below:

Project A.2 - Commission Determinations Regarding an Agency's Conflict of Interest Code

When and how the Commission should make certain determinations regarding an agency's conflict of interest code is often confusing. This project examines whether there is a need for policies, prescribed procedures or possibly legislative amendment that will enable the Commission to effectively advise individuals of an agency, or code reviewing bodies, on the content of an agency's conflict of interest code. In particular, a main concern is deciding the appropriate manner in which to render assistance relating to an agency's conclusions in the conflict of interest code as to which individuals have disclosure obligations. A collateral issue is whether, under current Commission regulations and policies, advice should be issued to an individual when the advice will impact the provisions of an agency's conflict of interest code.

Status: No concrete proposals are presented at this time on Project A.2. We had hoped to have more concrete recommendations to some of the issues raised in the previous memos, but the complexity of this important project requires more staff time and resources. We would like to see this project continue to move forward, but further study is needed.

The complexity of this project has continued to identify more issues. One threshold question that often comes from a new commission, advisory body or nonprofit corporation seeking our advice is whether it is a "local government agency" and does it need to adopt a conflict of interest code. We also seek to clarify when individuals who work for local agencies, or code reviewing bodies, may seek advice and/or assistance or

appeal a determination by the agency concerning the disclosure and disqualification provisions of the Act. We are working on amendments to Regulation 18329 concerning the advice process as to all these issues. We plan to bring these amendments before the Commission for prenotice discussion at the December 13, 2002 meeting.

Project A.7 - Commission Role – Section 87200

Officials listed in section 87200 are subject to extensive disclosure requirements under the Act. When section 87200 was amended to add “other public officials managing public investments,” the Commission considered what types of public officials would qualify under this new category; these public officials would no longer be required to file statements under their agencies’ codes. These standards are now codified in regulation 18701(b). This project entails examining what procedural mechanisms can be implemented when code reviewing bodies or individuals in an agency seek clarification or a determination regarding when a particular type of public official is one who manages public investments.

Status: As noted in the memorandum to the Commission dated June 28, 2002, staff developed language that can be included as an informational item in a conflict of interest code identifying investment manager positions not covered by the code that are subject to disclosure under section 87200. The language also notifies individuals that they may contact the Commission regarding their status as section 87200 filers. Staff needs further time to study other, perhaps more formal, methods of implementation.

Project A.5. Conflict of Interest Codes – Placement of Positions/Classification in Appropriate Disclosure Categories

Public officials who make or participate in the making of governmental decisions are required to file SEIs. Pursuant to section 82019, a position must be designated for inclusion in an agency’s conflict of interest code when “the position entails the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest.” Regulation 18730, subdivision (b)(2) provides that for those persons declared to be designated employees in a conflict of interest code, “[i]t has been determined that these persons make or participate in the making of decisions which may foreseeably have a material effect on financial interests.” The legal departments of most agencies make the actual determinations as to which positions should be designated. This project examines whether there are effective procedures or guidelines for filing officers on how to identify designated employees, notify them of their filing requirement and set forth a timeline for accomplishing both of those tasks.

Status: In the last report to the Commission, staff had conducted a survey of state agencies and concluded that it was appropriate to permit state agencies to continue to adopt and implement their own methods for identifying their designated employees.

The next issue for staff to address became whether the Commission should establish procedures or guidelines for filing officers regarding: how to identify designated

employees; how to notify designated employees of their filing requirements; and the timeline for accomplishing designation and notification. If it is determined that the Commission should establish those procedures or guidelines, then what method would be most effective in providing those procedures or guidelines to state and local agencies?

Staff conducted a survey of filing officers for various state and local agencies to discover: how those agencies determine a designated employee's disclosure category; how those agencies notify a designated employee of his or her filing requirements, and in what time frame those notifications are being made. Staff reviewed filing officer outreach summaries for 24 state agencies and 25 local (city/county) agencies visited over the last 24 months. Staff determined that the information contained in the 49 summaries provided a reliable sampling of the procedures being followed by state and local filing officers or filing officials. The results of the survey are as follows:

	State Agencies		City/County Agencies	
	Responses by Number	Responses by Percentage	Responses by Number	Responses by Percentage
Notification of Filing Obligation	Yes – 22 No – 2	Yes – 92% No – 8%	Yes – 21 No – 4	Yes – 84% No – 16%
Maintaining a Log Filing	Yes – 15 No – 9	Yes – 68% No – 32%	Yes – 23 No – 2	Yes – 92% No – 8%
Notification of Non-Filers	Yes – 9 No – 15	Yes – 32% No – 68%	Yes – 7 No – 18	Yes – 28% No – 72%
Referrals to the FPPC	Yes – 4 No – 20	Yes – 18% No – 91%	Yes – 3 No – 22	Yes – 12% No – 88%

Notification of Filing Obligation: Staff asked whether the filing officer or filing official consistently notifies (either orally or in writing) each designated employee of his or her obligation to file a statement of economic interests (assuming office, annual, or leaving office). Approximately 92% of the filing officers/officials surveyed in state agencies are notifying designated employees of their filing obligations. Approximately 84% of the filing officers/officials surveyed in city/county agencies are notifying designated employees of their filing obligations. Staff assumes that the notifications are provided to each employee in advance of the filing deadline, however staff was not able to determine the actual number or percentage of the notifications that occur prior to the filing deadline as opposed to after the filing deadline.

Maintaining a Log of Filing: Staff asked whether the filing officer or filing official maintains a log of SEI filings for each designated employee, documenting when an employee files his or her assuming office statement of economic interests, each annual statement of economic interests as it becomes due, and a leaving office statement of economic interests when leaving the agency. Approximately 68% of state agency filing officers/officials maintain such a log. Approximately 92% of city/county filing officers/officials maintain such a log.

Notification of Non-Filers: Staff asked whether filing officers or filing officials are aware of procedures recommended by the FPPC for contacting (either orally or in writing) a designated employee who has not filed his or her statement of economic interests by the due date, and seeking compliance with the filing obligation. Approximately 32% of state agency filing officers/officials are aware of the FPPC's recommended procedures for contacting non-filers. Approximately 28% of city/county agency filing officers/officials are aware of the FPPC's recommended procedures for contacting non-filers. Overall, less than one-third of the agency filing officers/officials surveyed are aware of the FPPC's recommended procedures for contacting non-filers and seeking compliance with the filing obligation.

Referral to the FPPC: Staff asked whether filing officers or filing officials are aware of the FPPC's recommended procedures for forwarding a referral to the FPPC's Enforcement Division when an agency employee still fails to file an SEI after being contacted about the non-filing. Only approximately 4% of state filing officers/officials, and 3% of city/county filing officers/officials are aware of the FPPC's recommended procedures for forwarding a referral to the Enforcement Division.

The summaries reviewed by staff did not address the issue of how agencies are determining the filing category of each individual designated employee. During staff's review of the survey results, staff concluded that the determination of each designated employee's disclosure category was not a problem area that warranted further review by staff. Staff is satisfied that it is appropriate to continue to permit agencies to adopt and implement their own methods for determining the filing categories for their designated employees. However problem areas identified were:

1. There are no uniform guidelines that set forth the type of notification that a designated employee should receive when being informed of an obligation to file, a statement of economic interests, and when that notification is to be provided.
2. There are no uniform guidelines that set forth what steps a filing officer/official is required to take if a designated employee fails to file a statement of economic interests by the filing deadline. Specifically, there are no guidelines for the type of follow-up contact that should be made (oral or written), the number of contacts that should be made and the time frame for making those contacts.
3. There are no uniform guidelines that set forth when a filing official/officer should refer a non-filer to the Enforcement Division, and what information should be included with the referral.
4. There is no statutory authority for holding filing officers/officials liable for failing to notify agency employees of their filing obligations.

Staff recommends the Commission establish more specific guidelines and procedures for filing officers/officials. Those guidelines should include the following:

1. Initial notification requirements, including timelines for notifying designated employees of filing requirements.

2. Required contacts or attempted contacts with each non-filer, timelines for making those contacts, and documentation requirements for those contacts.
3. Authority to hold filing officers/officials accountable for failing to comply with notification requirements.

While there are several methods that could be used to disseminate these guidelines, certain areas may require implementation of statutory or regulatory changes.

The authority to hold filing officers/officials accountable for failing to comply with notification requirements should be addressed statutorily. Amending section 81010 (duties of the filing officer) or section 87302 (required provisions) to include a requirement for filing officers/officials to notify agency employees of their SEI filing requirements in advance of the filing deadline would provide the authority for the Enforcement Division to hold filing officers/officials accountable for failing to comply with the notification requirement.

Once the statutory language is in place, the specific guidelines for notifying agency employees of their SEI filing requirements should be set forth in a regulation that includes:

1. Initial notification requirements, and timelines for notifying designated employees of filing requirements; and
2. Required contacts or attempted contacts with each non-filer, timelines for making those contacts, and documentation requirements for those contacts.

Promulgating these guidelines through statutory and regulatory changes is a superior method to publications, because it provides authority for accountability and liability for non-compliance that is not available through the voluntary compliance sought through publications. As a result, greater compliance with the notification guidelines and more uniform disclosure could be expected. Staff notes that we have not evaluated the impact on staff resources resulting from implementation of this project. Implementation involves development of a legislative proposal. Regulatory work would follow.

Project A.6 - Model Disclosure Categories

Most state and local agencies have adopted the Commission's model conflict of interest code. (Regulation 18730.) During the course of the Filing Officer Outreach Program, staff has conducted an informal review of local agency codes. Many of them require overly broad disclosure for designated employees, or do not provide for disclosure by consultants. The Commission authorized the staff to explore whether the Commission should develop model disclosure categories to assist agencies in crafting their codes. In July, the Commission approved the staff's recommendation to begin this project by developing model disclosure categories for state agencies.

Status: Review of the state agency conflict of interest codes has been completed and recommendations for model language are attached (Attachment A).

In our June 28 memorandum to the Commission, it was suggested that it might not be possible to develop a “one size fits all” category for use by all agencies. As a result of our review, we know that to be true. State agencies are specific as to purpose, function and clientele they serve. For example, the Department of Health Services has a specific role with regard to providing medical or health services, which of course is a different role or function from the Department of Fish and Game.

However, while agencies are different in purpose, agencies do contract for services or supplies, so we can provide a model contracting disclosure category. Additionally, we developed a model for use by agencies with regulatory authority and for agencies that grant funds or approve service providers. We believe we can recommend use of these models to replace similar existing language in conflict of interest codes, but because each agency is different in scope, each agency should be permitted to supplement the models with categories that capture all conceivable conflicts of interests.

Staff requests that the Commission ratify the model categories set out in Attachment A and authorize the Executive Director to approve future changes to the categories. The model categories will be sent to all state agencies in January during the biennial review process. (See section 87306(b).) The model categories also will be provided to new agencies during the code adoption process. Staff also plans to post the model categories on the Commission’s web site.

If the Commission wishes to pursue this project beyond 2002, we could start this fall and have models in place for local government agencies in time for their 2004 biennial review. Again, we cannot develop a model for use by all local government agencies, but can develop language for use by categories of local governments, e.g., fire departments, water districts, transit agencies, school districts, public works departments, planning departments, etc.

Project B.2 - Definition of Investment

The definition of “investment” in section 82034 contains various exceptions, including diversified mutual funds registered with the Securities and Exchange Commission, trust funds, and government bonds. In the past few years, many new investment vehicles have been created that are similar to mutual funds but are not “diversified mutual fund[s] registered with the Securities and Exchange Commission.” Despite the fact that the official has no control over how and where these funds are invested, they are reportable and may be disqualifying. The Commission authorized the staff to determine whether the Commission should sponsor legislation to amend section 82034 to address these concerns.

Status: Staff has been unable to devote resources to this project and does not anticipate that a proposal can be developed this year.